Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1998

SHARI BAIR, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF C. W. BAIR, PETER VOSKAMP, and JERRY AMUSSEN,

Petitioners,

v.

WILLIAM FRED HAGANS, SEWELL & RIGGS, BARRY ABRAMS, WILLIAM MATTHEWS, CLYDE WILSON and HAGANS & SYDOW,

Respondents.

On Petition for Writ of Certiorari to the Fourteenth Court of Appeals of Texas

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Is the appellate court's action, in the striking of a litigant's points of error on appeal, essentially appellate death penalty sanctions which, therefore, must meet the test of *Societe Internationale v. Rogers*, 357 U.S. 197, 78 S.Ct.1087 (1958)? If so, is the court's failure to properly apply the *Societe* test a violation of a litigant's right to due process?

2. Can a litigant be subject to death penalty sanctions when (his) violation was caused, in whole or in part, by the breach of duty of a public official, in this case, the District Clerk? Does the same constitute a denial of (his) Fifth and Fourteenth Amendment rights to due process of law?

3. Is Texas Rule of Appellate Procedure 74(f), so vague as to result in the violation of a litigant's rights to due process and equal protection under the law?

4. Does the Seventh Amendment guarantee a litigant the right to trial by jury so as to preclude summary judgment where a genuine issue of material fact continues to exist?

5. Where a summary judgment is reviewed on appeal "de novo," does the appellate court's failure to review the record in the light most favorable to the non-movant, constitute a violation of a litigant's right to trial by jury?

PARTIES TO THE PROCEEDINGS

The names of all parties to the proceedings are as follows:

1. PETITIONERS

Shari Bair, Individually and as Representative of the Estate of C. W. Bair, Peter Voskamp, Jerry Amussen

Attorney for Petitioners

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2. RESPONDENTS

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In The

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October Term, 1998

SHARI BAIR, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF C. W. BAIR, PETER VOSKAMP, and JERRY AMUSSEN,

Petitioners

v.

WILLIAM FRED HAGANS, SEWELL & RIGGS, BARRY ABRAMS, WILLIAM MATTHEWS, CLYDE WILSON and HAGANS & SYDOW,

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE FOURTEENTH COURT OF APPEALS OF TEXAS

The Petitioners, SHARI BAIR, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF C. W. BAIR, PETER VOSKAMP, and JERRY AMUSSEN, respectfully pray that a Writ of Certiorari issue to review the opinion of the Fourteenth Court of Appeals of Texas, rendered and filed in the above-entitled proceeding on May 29, 1997, and the subsequent denial of the Petition for Review by the Supreme Court of Texas.

OPINIONS BELOW

The Supreme Court of Texas denied the Petitioners' Petition for Review as is represented in Appendix B hereto. The memorandum decision of the Fourteenth Court of Appeals (Justices Anderson, O'Neill and Cannon sitting) was authored by Justice Cannon and is

unpublished.[1] It is printed in Appendix A hereto.

JURISDICTION

The Petitioners initially brought suit in the 157th District Court located in Houston, Harris County, Texas. The Fourteenth Court of Appeals Opinion was rendered and filed on May 29, 1997 (Appendix A). The Supreme Court of Texas denied Petitioners' Petition for Review on April 9, 1998. (Appendix B). The Supreme Court of Texas denied Petitioners' Motion for Rehearing of Petition for Review on July 30, 1998. (Appendix C). This Court's jurisdiction is invoked under Title 28, U.S.C. §1257.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES OF COURT

UNITED STATES CONSTITUTION

U.S. CONST. amend. V.
No person shall ... be deprived of life, liberty, or property, without due process of law; ...

U.S. CONST. amend. VII.
In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

U.S. CONST. amend. XIV.
...No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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1 The Honorable Bill Cannon was sitting by special assignment.

UNITED STATES STATUTES

Title 28, U.S.C. §1257
State courts; certiorari
(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

...

TEXAS STATUTES

TEX. GOV'T. CODE ANN. §51.303 (Vernon 1988)

...

(a) District Clerks Duties & Powers
The clerk of a district court has custody of and shall carefully maintain and arrange the records relating to or lawfully deposited in the clerk's office.

TEXAS RULES OF COURT

TEX. R. CIV. P. 166a
SUMMARY JUDGMENT
(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the adverse party has appeared or answered, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to amount of damages.
(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment

in his favor as to all or any part thereof.

(c) ... The judgment sought shall be rendered forthwith if (i) the deposition transcripts, interrogatory answers, and other discovery responses referenced or set forth in the motion or response, and (ii) the pleadings, admissions, affidavits, stipulations of the parties, ... on file at the time of the hearing, ... show that, except as to the amount of damages, there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law on the issues expressly set out in the motion...

...

TEX. R. CIV. P. 324

PREREQUISITES OF APPEAL

(a) Motion for New trial Not Required. A point in a motion for new trial is not a prerequisite to a complaint on appeal in either a jury or a non-jury case, except as provided in subdivision (b).

(b) Motion for New Trial Required. A point in a motion for new trial is a prerequisite to the following complaints on appeal:

(1) A complaint on which evidence must be heard such as one of jury misconduct or newly discovered evidence or failure to set aside a judgment by default;

(2) A complaint of factual insufficiency of the evidence to support a jury finding;

(3) A complaint that a jury finding is against the overwhelming weight of the evidence.

(4) A complaint of inadequacy or excessiveness of the damages found by the jury; or

(5) Incurable jury argument if not otherwise ruled on by the trial court.

...

TEX. R. APP. P. 51(c)

THE TRANSCRIPT ON APPEAL

(c) Duty of Clerk. Upon perfection of the appeal, the clerk of the trial court shall prepare under his hand and seal of the court and immediately transmit the transcript to the appellate court designated by the appellant. The pages of the transcript shall be numbered consecutively and there shall be an index prepared by the clerk showing the location of each document in the transcript. The transcript shall be prepared in the form directed by the

Supreme Court and the Court of Criminal Appeals which will make an order or orders in such respect for the guidance of trial clerks. ...

...

TEX. R. APP. P. 52

PRESERVATION OF APPELLATE COMPLAINTS

(a) General Rule. In order to preserve a complaint for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling he desired the court to make if the specific grounds were not apparent from the context. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection or motion. If the trial judge refuses to rule, an objection to the court's refusal to rule is sufficient to preserve the complaint. It is not necessary to formally except to rulings or orders of the trial court.

...

(d) Necessity for Motion for New Trial in Civil Cases. A point in a motion for new trial is prerequisite to appellate complaint in those instances provided in Rule 324(b) of the Texas Rules of Civil Procedure.

TEX. R. APP. P. 83

NO AFFIRMANCE, REVERSAL OR DISMISSAL FOR WANT OF FORM OR SUBSTANCE

A judgment shall not be affirmed or reversed or an appeal dismissed for defects or irregularities, in appellate procedure, either of form or substance, without allowing a reasonable time to correct or amend such defects or irregularities provided the court may make no enlargement of the time for filing the transcript and statement of facts except pursuant to paragraph (c) of Rule 54 and except that in criminal cases late filing of the transcript or statement of facts may be permitted on a showing that otherwise the appellant may be deprived of effective assistance of counsel.

STATEMENT OF THE CASE

This case originally arose from Petitioners' appeal from a summary judgment granted by the 157th State Judicial District Court of Houston, Harris County, Texas. Petitioners Shari Bair, individually and as representative of the estate of C.W. Bair, Peter Voskamp and Jerry

Amussen (collectively "Petitioners"), brought suit against three attorneys (Fred Hagans, Barry Abrams, and William Matthews), two law firms (Sewell & Riggs and Hagans & Sydow), and a private investigator (Clyde Wilson) alleging a series of torts in connection with the Respondents' alleged fabrication of evidence and subornation of perjury in connection with the filing of a frivolous bill of review action which, Petitioners contend, was designed for other motives, but ultimately resulted in their loss of the major portion of a judgment worth in excess of $5,000,000.

The Defendant Respondents fall into three groups: Hagans and Hagans & Sydow (hereafter "Hagans"), Abrams, Matthews, and Sewell & Riggs (hereafter "Sewell & Riggs"), and Clyde Wilson (hereafter "Wilson"). Although this case was filed in late 1988, it was dismissed in 1991 for a single act of discovery abuse. That dismissal was reversed, based on *Transamerican Natural Gas Corp. v. Powell,* 811 S.W.2d 913 (Tex. 1991), and the case was remanded to the trial court in August of 1992. Not long after the case was remanded, all of the Respondents filed motions for summary judgment and, in 1994, the trial court granted those motions. A record was requested and, ultimately the Petitioners' brief was filed. In their four points of error filed with the Court of Appeals, Petitioners claimed that (1) the trial court erred in granting the summary judgment motions, and (2) that the granting of the summary judgment motions (using a standard inconsistent with the accepted rule of the common law) essentially denied them their right to trial by jury. This was the first time Respondents raised the issue of whether the trial court's action in granting summary judgment, despite the continued existence of genuine issues of material fact, deprived the Petitioners of their right to trial by jury as guaranteed by the 7th Amendment to the Constitution of the United States.

Throughout the period that this case was on appeal to the Fourteenth Court of Appeals, the compilation of the appellate record was nothing short of a nightmare. Petitioners filed their notice of appeal and properly requested that the record be prepared and filed with the appellate court for review; however, in the ensuing three years, that would be the only smooth part to this appeal.

At the time that Petitioners' initial brief became due, Petitioners'

counsel was in trial (coincidently against a defendant who was also a principal player in the facts underlying this case) that ultimately ended in a mistrial after fifteen weeks. During this time, counsel made and the Court granted her reasonable extension requests; however, upon preparation of Petitioners' brief counsel discovered that the District Clerk had failed to include a large part of the requested materials in the official transcript. Although admittedly containing only limited transcript references, counsel timely filed Petitioners' brief citing to extensive case authority and statements supporting her request for reversal. When the Respondents raised arguments regarding her (Petitioners' counsel)'s inadequate "briefing," counsel became acutely aware of the appellate record deficiency and began her attempt to secure a duplicate record and have the Clerk file the same with the appellate court. She also asked to amend her brief with more record cites. There was never a contention that Petitioners had not timely requested what would have been a sufficient record on appeal; instead, apparently the district clerk simply "misplaced" the majority of the court's file, making it impossible to fully comply with Petitioners' requests for a full record.

Soon counsel became consumed with the task of supplying enormous volumes of her file copies of documents to the trial court for certification of the same as duplicate originals[2] in order to have them transferred to the appellate court for construction of the record. This process caused additional delays and drew disfavor of the court, the latter being fed by the Respondents' refusal to stipulate to the necessary supplementations and the resulting extensions required. This was particularly unfair, in light of the fact that the duty to maintain the Court's file is vested with the clerk of the court by statute. (See TEX. GOV'T. CODE ANN. §51.303(a) (Vernon 1988)) It was through no fault of Petitioners' counsel that the file was not properly maintained and, therefore, not available to properly cite to on appeal. Petitioners filed the last supplemental transcript with the Court of Appeals

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2 Even this ministerial process was a nightmare, since substitution of documents required the agreement and stipulation of all parties and, as here, when agreement could not be reached, an administrative judge had to hear the matter because the judge who was familiar with the record had since been appointed as the Chief Justice on the Court of Appeals.

in late August of 1996.

Petitioners' counsel was again put to trial (in the aforementioned mistrial case) in October of 1996 and was still in trial when the instant appeal was set for oral argument. In response to the Court's questions regarding her insufficient briefing, counsel asked if the Court would extend her the opportunity to rebrief; however, the Court was not inclined to allow the same. Although in other circumstances, counsel may otherwise have simply amended the brief and then asked for leave to file, in light of the Court's earlier directive (on a prior occasion) that no amendments to the brief would be allowed, she did not do so. Although she later got the right to amend one time in June, that was still at a time before the district clerk had completed his preparation of the supplemental transcript. As a result of these facts, she did not risk drawing wrath upon her client via an uninvited and unwelcome "Second Amended Brief." Six months after argument, the Court affirmed the trial court's granting of summary judgment, finding that the Petitioners had waived their points of error, due to insufficient briefing. With their Motion for Rehearing, Petitioners requested leave to file (and did tender) an amended brief which referenced 194 cites to the finally reconstructed appellate court transcript. Subsequently, that motion was denied and the amended brief was rejected.

The Court of Appeals ultimately affirmed the trial court's judgment primarily based upon its finding that Petitioners had waived the great majority of their arguments through poor briefing and an inadequate number of record cites. The court also found that the Petitioners had waived their Seventh Amendment challenge because they had not first presented the issue to the trial court for consideration. This holding was made despite the fact that they, the Petitioners, did not and could not have known the Court would act outside the common law standard before the summary judgment was decided. The opinion of the Fourteenth Court of Appeals was designated "not for publication" under TEX. R. APP. P. 90.

As mentioned earlier, in response to the appellate court's opinion, Petitioners immediately filed a Motion for Rehearing raising, for the first time, the denial of due process and equal protection arguments resulting from what they now characterize as "death penalty" sanctions at the

appellate court level. They also filed a Motion for Leave to File their Second Amended Brief. After Petitioners' motion for rehearing was denied, a Petition for Review was subsequently filed in the Texas Supreme Court. The Supreme Court denied the Petition for Review and Rehearing of the same. (See Appendix B and C.)

Background - (The Original Case)

In 1982, Petitioners, Pete Voskamp, Shari Bair and Jerry Amussen, filed a stock fraud suit against Roman F. Arnoldy, John Arnoldy, and Triten Corporation (hereafter "the Voskamp case"). Respondent Hagans, along with his then partner, Houston attorney, John O'Quinn, represented Petitioners in the trial of the Voskamp case. Mr. O'Quinn is a highly controversial, nationally recognized trial lawyer and something of a "lightning rod" within the Texas Bar.[3] Respondents Matthews, Abrams, and Sewell & Riggs, represented the Arnoldy defendants. After a trial on the merits, the jury returned a verdict valued in excess of five million dollars ($5,000,000) in favor of Petitioners; however, almost immediately thereafter, the trial court entered a judgment notwithstanding the verdict. That take-nothing judgment was then appealed to the First Court of Appeals sitting in Houston, Texas.

At or near the time the Voskamp case was tried, Mr. O'Quinn was the subject of a highly publicized barratry investigation by the State Bar of Texas. As part of that investigation, the State Bar had retained another well-known Houston lawyer, Tom Alexander, to serve as special prosecutor over that case. Supposedly, after oral argument but before the Court of Appeals had issued its opinion, Sewell and Riggs "discovered" facts which led them to believe O'Quinn had tampered with the jury in the Voskamp

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3 See *The Best Paid Trial Lawyers,* FORBES, October 16, 1989, at 204; Max Boot, *Rule of Law: A Courtier Implicates the King of Torts,* Wall St. J., December 18, 1996, at A21; Mary Flood, *Open Season: Lawyers Slam Disciplinary Secrecy,* Wall St. J., October 21, 1998, at T1; Brigid McMenamin, *The Best Paid Lawyers,* FORBES, November 6, 1995, at 145; *O'Quinn Pleads Guilty to Practicing Law Without a License,* Wall St. J., December 18, 1997, at B12; and Christopher Palmeri, *A Texas Gunslinger (Attorney John M. O'Quinn),* FORBES, July 3, 1995, at 42.

case. Tom Alexander, acting outside the proper scope of his authority as a special prosecutor for the State Bar of Texas concerning the barratry investigation, had also "discovered" (if not concocted and/or flat out intentionally fabricated) false information to the effect that O'Quinn had tampered with the Voskamp jury. Alexander, who was later found to have improperly (without the Bar's consent), retained Respondent Clyde Wilson as an investigator in the original barratry investigation, sua sponte expanded both his and Wilson's role to include investigating the newly alleged jury tampering charges.

He (Alexander) and Wilson, then "reported" the false information, not only to the Harris County District Attorney's office, but also to the public at large through Wilson's disclosure to the media in blatant violation of the State Bar Rules requiring absolute confidentiality. In spite of these pressure tactics and ensuing media campaign of mis-information, no grievance was filed with the State Bar. Likewise, the State Bar of Texas did not, on its own motion, prosecute the claim based on the "information" filed by its own special prosecutor, Tom Alexander or by Alexander's own hand picked investigator, Clyde Wilson.

At some point, Sewell & Riggs sought to gain access to otherwise confidential and privileged information obtained by Wilson by virtue of his (Wilson's) relationship with Tom Alexander and Alexander's ensuing authority of the State Bar of Texas by also retaining Clyde Wilson to investigate the allegations of Mr. O'Quinn's jury tampering in the Voskamp case.

In the course of investigating the barratry charges for Alexander and the tampering charges for Sewell & Riggs, Wilson obtained two affidavits from Respondent Hagans, who, although by now had severed his partnership with O'Quinn, still served as one of the Petitioners' attorneys and as co-counsel on the Voskamp appeal. Wilson also contacted two other witnesses and obtained/extorted what were later proved to be largely false affidavits designed, on their face, to give the appearance of support to the jury tampering allegations. Although Sewell & Riggs went with Wilson and provided this information to the Harris County District Attorney's office, the District Attorney's office, again, chose not to pursue charges.

Sewell & Riggs did not, however, report this same information to either the District Court Judge or the jurists who were then considering the matter at the Court of Appeals, as was required by the State Bar of Texas' own rules of Professional Conduct.

Apparently, as long as their take-nothing judgment was upheld on appeal, Sewell & Riggs' sense of justice was not so inflamed as to demand disclosure. However, on November 27, 1987, all of that changed. It was on that date that the Court of Appeals issued its opinion in which it reversed the JNOV and entered judgment for the Petitioners on the jury verdict. Coincidentally, after the appellate court reversed the trial court's ruling and found that the trial court's action in entering the JNOV was erroneous, the Respondents felt the jury tampering evidence now became so "compelling" that it must be brought to the attention of the Court. This was many months after the original affidavits were obtained and/or otherwise had come into the possession of all Respondents. It was at this point that Sewell & Riggs filed a motion for rehearing in the Court of Appeals, based primarily upon the allegations of jury tampering. The First Court of Appeals overruled this motion, noting the delay in presentation, but did acknowledge that "the contentions advanced should properly be resolved by appropriate bill of review proceedings, where evidence may be presented and a thorough factual determination made." *Voskamp v. Arnoldy*, 749 S.W.2d 113, 127 (Tex.App.--Houston [1st Dist.] 1987, writ denied).

The Attempt to Abstract and the Bill of Review

Only four days after the November 12, 1987 Court of Appeals opinion in the Voskamp case, Petitioners moved in the trial court to enter judgment on the verdict. Upon a motion from Sewell & Riggs, the Court of Appeals issued an injunction enjoining Petitioners from interfering with its jurisdiction until issuance of its final mandate at the end of the appeal. Respondents also filed a bill of review seeking to avoid responsibility for the underlying judgment. On March 28, 1990, the trial court entered a take nothing judgment in the bill of review action, noting in a letter to the attorneys, "it appears that the Plaintiffs in the Bill of Review proceeding may have used the proceeding as leverage over the Defenders. That the Plaintiffs in the Bill of Review were found by a jury ... to have engaged in

fraud increases my concern about the motivations for the Bill of Review."

Unfortunately during the period the bill of review had been on file, many of the assets available to pay the original judgment were lost or squandered by the *Arnoldy* Defendants - Defendants who had been found to have committed fraud in the original underlying case.

The Action for Breach of Fiduciary Duty, Fraud and Conspiracy

After the bill of review action was concluded, Petitioners filed this action in district court (and a parallel suit against Alexander, et al in probate court) seeking to collect the damages they sustained as a result of their lawyer (Hagans') breach of duty and conspiracy with the other defendants who, they alleged, engaged in various illegal, wrongful conduct also to their detriment. After an unsuccessful attempt to have the case thrown out on sanctions, the Respondents moved for summary judgment in this case which the trial court granted despite the continued existence of genuine issues of material fact.

The Appeal

Petitioners then appealed that summary judgment to the Fourteenth Court of Appeals in Houston, Texas. The Court of Appeal dismissed the heart of Petitioners' case holding that the Petitioners "wholly failed to adequately present their contentions on appeal." This was in spite of the fact that the brief met all requirements of Rule 74 of the Texas Rules of Appellate Procedure[4] except that it had limited cites to the transcript on appeal. Otherwise, the brief contained the names and addresses of all parties and their counsel; it contained a Table of Contents and an Index of Authorities with page references; it contained a preliminary statement generally stating the nature of the cause of action; it contained points or error; it contained extensive argument and authority, and it contained a proper prayer for relief. The Court of Appeals' sole complaint was that the number of cites to the transcript (35) was insufficient under the circumstances.

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4 See Appendix D.

It is true, as stated by the Appellate Court in their opinion, that the record in this case consisted of an original transcript and three supplemental transcripts for a total of 16 volumes and 3,710 pages. It is also true that in the preliminary statement and procedural history section of their original brief, the Petitioners included few citations to the transcript then on file (although the record citation included in this section did refer the court to a key exhibit attached to Petitioners' pleadings in this case which was a letter from the trial judge expressing deep concern that the bill of review proceeding brought by Sewell & Riggs on behalf of their clients was done and used as "leverage" against the Petitioners.) (See quote *infra pp 11-12*) The opinion did not, however, mention that of those 3,710 pages of transcript, approximately 2,700 of those pages were obtained by Petitioners through motions to substitute lost documents and subsequent motions to supplement the appellate record, because it (the appellate record) had been lost by the District Clerk. Finally, it is true that the Amended Brief filed in June, 1996, contained only limited cites to the record, but it is also true that the bulk of the supplemental record and lost documents were not gathered, authenticated and made available for citation until August of that same year. Finally, this was not a brief that was filed by counsel or clients who were callously or consciously indifferent to the briefing requirements embodied in the Rules of Appellate Procedures. Although the various subsections of Petitioners' brief had limited references to the transcript, it made over a hundred cites to relevant cases and statutes.[5]

Upon oral argument, the Court of Appeals assigned the case to a visiting judge, who held that the Petitioners had waived points except for those complaining of the trial court's granting of summary judgment on their claims of malicious prosecution, by failing to adequately brief their claims. This opinion was particularly painful given that counsel for Petitioners was essentially forced to recreate the entire record before filing it on appeal. All of this effort and delay was a direct result of the District

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5 The Court of Appeals granted Petitioners reasonable extensions of time to file their brief and allowed one amendment to their brief; the amended brief was required to be done before the supplemental transcript was completed.

Clerk of Harris County, Texas' failure to maintain the Court's file as required by law! (See TEX. GOV'T. CODE ANN. 51.303 [Vernon 1998].)

REASONS FOR GRANTING THE WRIT (ARGUMENTS)

QUESTION 1

IS THE APPELLATE COURT'S ACTION, IN THE STRIKING OF A LITIGANT'S POINTS OF ERROR ON APPEAL, ESSENTIALLY APPELLATE DEATH PENALTY SANCTIONS WHICH, THEREFORE, MUST MEET THE TEST OF *SOCIETE INTERNATIONALE V. ROGERS*, 357 U.S. 197, 78 S.CT.1087 (1958)? IF SO, IS THE COURT'S FAILURE TO PROPERLY APPLY THE *SOCIETE* TEST A VIOLATION OF A LITIGANT'S RIGHT TO DUE PROCESS?

Whether an imposition of sanctions is "just" is measured by two standards. First, a direct relationship must exist between the offensive conduct and the sanction imposed. This means that "just" sanctions must be directed against the abuse and toward remedying the prejudice caused the innocent party. It also means that the sanction should be visited upon the offender. The court must at least attempt to determine whether the offensive conduct is attributable to counsel only, or to the party only, or to both. This may not be an easy matter in many instances. On the one hand, a lawyer cannot shield his client from sanctions; a party must bear some responsibility for its counsel's actions when it is or should be aware of counsel's conduct and the violation of court rules and procedures. On the other hand, a party should not be punished for counsel's conduct in which he is not implicated apart from having entrusted to counsel its legal representation. The point is, the sanctions the trial court imposes must relate directly to the abuse found and be directed toward the abuser who perpetrated or assisted in the offense.

Second, "just" sanctions must not be excessive. The punishment should fit the crime. A sanction imposed should be no more severe than necessary to satisfy its legitimate purposes. Thus, it follows naturally that

courts must consider the availability of less stringent sanctions in order to determine whether such lesser sanctions would fully promote compliance.

These standards set the bounds of permissible sanctions within which courts must exercise sound discretion. The imposition of very severe sanctions is limited, not only by these standards, but by constitutional due process. The sanctions imposed against Shari Bair, Pete Voskamp and Jerry Amussen by the Fourteenth Court of Appeals are the most devastating an appellate court can assess against a party. When an appellate court strikes a party's brief, dismisses its appeal and, thereby, affirms a lower court's judgment simply for inadequacies in the briefing process, the court adjudicates the party's claim without regard to its merits, but based instead upon the parties' counsel's conduct on appeal. On appeal, just as with sanctions imposed by the trial court, "[t]here (must be) constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for consideration of the merits of his cause." See generally *Societe Internationale v. Rogers,* 357 U.S. 197, 209-10, 78 S.Ct. 1087, 1094, 2 L.Ed.2d 1255 (1958), citing *Hammond Packing Co. v. Arkansas,* 212 U.S. 322, 350-51, 29 S.Ct. 370, 379-80, 53 L.Ed. 530 (1909), and *Hovey v. Elliott,* 167 U.S. 409, 17 S.Ct. 841, 42 L.Ed. 215 (1897); accord *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee,* 456 U.S. 694, 705-06, 102 S.Ct. 2099, 2105-06, 72 L.Ed.2d 492 (1982). Sanctions cannot be used to adjudicate the merits of a party's claims or defenses unless a party's hindrance of the judicial process justifies a presumption that its claims or defenses lack merit. *Insurance Corp. of Ireland,* 456 U.S. 694, 705-06, 102 S.Ct. 2099, 2105-06; *Societe Internationale,* 357 U.S. at 209-10, 78 S.Ct. at 1094; *Hammond Packing,* 212 U.S. at 350-51, 29 S.Ct. at 379-80.

Whether the denial of due process occurred at the trial or appellate level should not be controlling. In short, there are Constitutional limitations on all courts, whether state or federal, trial or appellate. It is not sufficient grounds to abridge a litigants' rights to due process merely

because it is the appellate court's docket that is overburdened.[6]

In fact, there may be more of a compelling reason for dismissal (i.e., permitting "death penalty" sanctions) when the violation was at the trial court level and the result of the violation deprived the opposing party of discovery needed to prosecute or defend his claim. *Hammond Packing Co. v. State of Arkansas*, 212 U.S. 322, 29 S.Ct. 370, 53 L.Ed. 53 (1909). In that situation, dismissal can be at least more justly upheld if the failure to produce requested documents gave rise to and supported the permissible presumption that if the requested and ordered documents were produced, they would not be favorable to the party resisting production, and, therefore, that the case (appeal) lacked merit. The application of this presumption gives rise to situations where the court can take certain facts, such as personal jurisdiction, as true, such as was done in *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 705-06, 102 S.Ct. 2099, 2105-06, 72 L.Ed.2d 492 (1982). The situations in *Hammond Co. Packing* and *Insurance Corp. of Ireland, Inc.* are clearly distinguishable and far more supportive of death penalty sanctions than in matters on an appeal where the development of the opposing parties' case is not impaired by a party's lack of information or lack of strict compliance with appellate court rules or orders.

In some cases, such as where a party refuses to bring their brief in compliance despite the imposition of lesser sanctions, it may well be within the court's discretion to presume that an asserted claim or defense lacks merit and thereby dispose of the appeal accordingly. See *Insurance Corp. of Ireland,* 456 U.S. at 705-06, 102 S.Ct. at 2105-06. In Petitioners' case, the infraction was limited to a single violation of a subsection of one of the Court's rules which was caused, in part, by a breech of duty by a public official. The brief had numerous case cites and contained thirty-five (35) references to the transcript in support of their assertions. Moreover, this

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6 Whether a denial of due process arose because of a party's violation of a discovery deadline, or because of a lack of compliance with some other type of court rule or order, should, likewise, not be controlling. See *Hovey v. Elliott,* 167 U.S. 409, 17 S.Ct. 841, 42 L.Ed. 215 (1897).

absence of a greater number of references was, to some degree, explained by the fact that the transcript was largely non-existent at the time the original brief, and even the later allowed amended brief, was due to be filed.

Therefore, although punishment and deterrence are legitimate purposes for sanctions, *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 96 S.Ct. 2778, 49 L.Ed.2d 747 (1976) (per curium); *Bodnow Corp. v. City of Hondo,* 721 S.W.2d 840 (Tex. 1986), they do not justify "trial" by sanctions. They also do not justify disposition by sanctions "on appeal." *See Hammond Packing,* 212 U.S. at 350-51, 29 S.Ct. at 379-80; *Hovey,* 167 U.S. at 413-14, 17 S.Ct. at 843. Sanctions which are so severe as to preclude presentation of the merits of the case should not be assessed against a party absent his flagrant bad faith or strong evidence of not only his counsel's callous disregard for the responsibilities of meeting the rules required for presenting a proper appeal, but also the client's knowledge and participation of the same. See *National Hockey League,* 427 U.S. at 642-643, 96 S.Ct. at 2780-81.

In assessing sanctions, especially death penalty sanctions, the Court must look at the entire record. Some of those circumstances relevant to this appeal include: (1) the breach of duty by the District Clerk; (2) the two meritless appeals, subsequent reversals and cost to Petitioners (3) the fact that Petitioners met all other briefing requirements; (4) the sole deficiency was the number of citations to the transcript (the brief had only thirty-five [35] record cites and the court felt it needed more); (5) the relative harm caused by the conduct versus the sanction, e.g. since this was an appeal of an order granting summary judgment, and such review is "de novo," the court, arguably, needed to review the entire record under any circumstances;[7] (6) the degree of harm when viewed in contrast with the value of the underlying judgment to these litigants and the cost of its

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7 *Douglass V. United Services Automobile Association*, 79 F.3d 1415 (5th Cir. 1996).

dismissal[8]; (7) the fact that there is no clear case law as to when and how often cites to the record are required; (8) the fact that the deadline to amend the brief ran before the clerk had fixed the record (the amended brief was filed in June, while the district clerk did not complete the preparation of the supplemental transcript until August); (9) the fact that there was never a court order directed toward Petitioners to rebrief; (10) the politics of this case and the seriousness of the alleged facts; (11) the trial court's finding regarding the lack of merit of the underlying Bill of Review; and (12) the fact that the merits of this underlying case against Respondents has never been examined.

When all of the relevant circumstances are considered, it is clear that Petitioners should not have had their causes of action dismissed. Initially, they were in substantial compliance with the rules. The statement of facts must summarize the material facts necessary for the court to understand the issues presented for review, and without which the court would be unable to consider the legal claims. A brief is clearly deficient if it totally omits a statement of the facts from the record. However, in cases such as with Petitioners' appeal, where there was an accurate, cogent statement of facts, "deficiency" is a much more vague question. Certainly the facts should be presented accurately, even if they are allowed to be cast in the light most favorable to the party presenting the issue on appeal.

Although the original statement of facts had few record citations, it thoroughly examined the factual and legal history of the case as it related to the issues on appeal. Although it did not, and at that point could not, contain a plethera of record cites, it was also "accurate" and fairly substantiated by the record presented at trial. This is evidenced by the fact that in its Second Amended Brief, each factual statement which had been made by the Petitioners in their earlier brief was supported by the record eventually filed. In fact, the Second Amended Brief, which was offered on

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8 The only result in allowing Petitioners to rebrief would have been delay -- delay in a highly political case, which had already been successfully delayed by Respondents through an erroneously filled bill of review and two prior meritless orders of dismissal at the trial court level.

rehearing together with a Motion for Leave to Amend, contained 194 references to the various volumes of transcript on file. Thus it appears that Petitioners' underlying brief, and particularly even the statement of facts as contained therein, met the purpose of a properly prepared statement of facts generally required on appeal. Since the appellate court must make a full review of the entire record regardless of the number of the citations contained in the brief on appeal, there is some argument that the harm it does and the inconveniences to the court don't warrant a complete sacrifice of a party's causes of action.

Also, it is true that, generally, courts of appeals need not consider points of error or arguments that are merely poorly articulated, undeveloped general statements or themes which do not reflect sound legal reasoning. In a summary judgment situation, the appellant preserves its point of error by stating that the trial court erred in granting summary judgment. They can then proceed to show "why" they are entitled to relief in their argument which follows. In this case the Petitioners presented points of error to the effect that the trial court erred in granting summary judgment, then went further and explained to the court, through clear, cogent arguments, why reversal was required on each particular cause of action. They then supported each of those arguments by well-reasoned precedent and clearly applicable authority. This is clearly not the type of conduct indicating the Petitioners or their counsel were consciously indifferent to the rules of briefing and appellate procedures.

The type of situation (where a reviewing court may refuse to address a claim because it was inadequately briefed) varies dramatically throughout and within the state and federal courts. On one end of the spectrum are cases involving briefs which are one paragraph long, cite no authority, do nothing but state the elements of negligence, without offering any arguments or authorities to support their claims. See *Goossen v. Estate of Standaert,* 525 N.W.2d 314 (Wis. Ct. App. 1994); *Allianz Insurance Company V. Gagnon,* 860 P.2d 720 (Nov. 1993) (Brief failed to cite to record; Appellant fined $1,000 to be paid to S. Ct. Law Library); *Insurance Corp. Of Ireland, Ltd. V. Compagnie Des Bauxites De Guinee*; 456 U.S. 694, 102 S.Ct. 2099, 72 L.Ed 2d 492 (1982) (Violation of multiple orders to produce discovery necessary for Plaintiffs case - struck claim of no

personal jurisdiction); *Casteel-diebolt V. Diebolt,* 912 S.W.2d 302 (Tex. App.-- Houston [14th Dist.] 1995, n.w.h.), (No legal authority or cites to trial court record); *Holt v. Sarver;* 442 F.2d 304 (8th Cir. 1971), (No cites to record; still the court searched the record and affirmed judgment on merits); *Douglass V. United Services Automobile Association,* 79 F.3d 1415 (5th Cir. 1996), (Poor briefing, etc. Appellate Court warns that further disregard for rules will result in dismissal); *Karl v. Davis,* 639 A.2d 214 (Md. App. 1994), (Cited once to the statement of facts; court issued warning); *United States v. Lynn;* 608 F.2d 132 (5th Cir. 1979), (Failed to adequately cite to record; court nevertheless reviewed the record of 50+ volumes); *Partin v. United States,* 434 U.S. 903, 98 S.Ct. 298, 54 L.Ed.2d 189 (1977), (Failed to cite to record, but court read entire trial transcript; issued warning); *Moore v. FDIC,* 993 F.2d 106 (5th Cir. 1993), (Brief contains only conclusions; no cites to records; appeal dismissed, but will be reconsidered with appropriate motion and evidence presented); and, *N/S Corporation, a Pennsylvania Corporation, v. Liberty Mutual Insurance Company*; 127 F.3d 1145 (9th Cir. 1997); (Brief was poorly done and only generally referred to the record; court reviewed the brief and found it sorely lacking, but still reviewed merits, then dismissal.). Next are situations in which a brief contains some argument, but no references to huge records (50+ volumes), causing the court to become so angry and disgusted that it spews contempt for the litigant and its counsel. *N/S Corporation v. Liberty Mutual Insurance Company*, 127 F3d 1145.[9] (Although, the court did, technically, dismiss the claim for poor briefing, it still made an exhaustive search of the record to determine if the dismissal was unjust or if the underlying claim had merit.)

Each of these cases stands in stark contrast to the case at bar, where the Petitioners' amended brief had a lengthy statement of facts, extensive well thought out arguments supported by eighty-four (84) separate cases,

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9 "This is a time when an appellant has approached our rules with such insouciance that we cannot overlook its heedlessness. We might have been inclined to overlook all of that, but after Liberty Mutual pointed to these failures, and others, in a motion to dismiss, N/S did not even deign to respond. More than that, it filed a reply brief in which it entirely omitted the table of contents and the tables of authorities cited. See Fed.R.App.P. 28(c)."

twenty (20) separate rules and statutes, resulting in a total of one hundred, thirty-three (133) cites to relevant authory as well as contained thirty-five (35) cites to the transcripts on file as of June 21, 1996. The sanction for Petitioners' deficient brief was to have the bulk of their case dismissed for lack of record cites and, later, to have their Motion for Leave to Amend the brief denied. If anything is clear in the present case, it is perhaps that the only parties who clearly played no part in this fiasco were the Petitioners. Although they may have technically had the burden to bring forth the record or appeal, they had no knowledge of its deficiencies and were never responsible for the care, custody or control of either courts' file.

Further, there is, likewise, nothing in the record to indicate that the court considered imposition of lesser sanctions or that any such lesser sanctions would not have been effective in eventually bringing the brief into compliance.[10] If anything, the record strongly suggests that lesser sanctions should have been utilized and would have been effective. In fact, the Second Amended Brief, which was submitted together with the Motion for Rehearing and Petitioners' Motion to Amend contained one hundred ninety four (194) cites to the now complete, eventually reconstructed record.

Despite this showing of effort, accuracy and contrition (as well as the Court's personal firsthand knowledge of the District Clerk's role in the problem through multiple motions on file), Petitioners were denied the opportunity to amend their brief and, thereby, denied their right to have their case decided on its merits.

Frequently, Texas courts will attempt to rationalize and justify dismissal of the heart of a litigants claim by stating that it did not affirm the judgment based on waiver because it left at least one of the points open for considerations on the merits. *Elder v. Bro;* 809 S.W.2d 799 (Tex.

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10 Just as with the trial court, the range of available sanctions for a party's abuse or rule violations was and is quite broad. The court could have ordered counsel to re-brief under TEX. R. APP. P. 83, by a specific date and punished any failure through lesser sanctions than dismissal; it could have taxed the costs of the delay against the Petitioners, awarded attorney's fees, or imposed a fine.

App.–Houston [14th Dist.] 1991, writ denied); *Henry S. Mill[er] Management Corp. V. Houston State Assoc.;* 792 S.W.2d 128 (Tex. App.–Houston [1st Dist.] 1990, writ denied); and *Tacon Mechanical Contractors, Inc. v. Grant Sheet Metal, Inc.*; 889 S.W.2d 666 (Tex. App.–Houston [14th Dist] 1994, writ denied). In short, in an effort to avoid an obvious due process violation, the courts will dismiss the most significant of claims (as in this case, the conspiracy and fraud claims against Wilson and Sewell & Riggs) then leave open the causes of action that it (the Court) feels could be more easily dismissed. As to the Petitioners' claims against their prior counsel, Fred Hagans, the court dismissed all points on appeal and affirmed his summary judgment solely based on waiver. Nothing in the record even approaches justification for so severe a sanction, especially in a situation arising from the alleged gross breach of the attorney-client relationship. *Casteel-diebolt V. Diebolt,*912 S.W.2d 302 (Tex. App.-- Houston [14th Dist.] 1995, n.w.h.); *Essex Crane Rental Corp. v. Striland Construction Co.* 753 S.W.2d 751 (Tex. App.-- Dallas 1988, writ denied). Essex has not argued or cited authority in support of these points, accordingly, points twenty-one and twenty-two are waived); *Holt v. Sarver;* 442 F.2d 304 (8th Cir. 1971), (Although it was not required to search record, here the court did search a "voluminous record," and found evidence to support the court's decision that the points should be overruled. Court then "affirmed" the judgment on merits, not as a sanction.); *Insurance Corp. Of Ireland, Ltd. V. Compagnie Des Bauxites De Guinee*, 456 U.S. 694, 102 S.Ct. 2099, 72 L.Ed 2d 492 (1982); and *National Hockey League v. Metropolitan Hockey Club*, 427 U.S. 639, 96 S.Ct. 2778, 49 L.Ed. 747 (1976).

There are cases, of course, when striking pleadings, dismissal, rendition of default and other such extreme sanctions are not only "just," but may be truly justified, if not absolutely necessary. See *National Hockey League,* 427 U.S. at 642, 96 S.Ct. at 2780. The case at bar is <u>not</u> one of those cases. In *National Hockey League*, the Court upheld the lower court's dismissal, in spite of later compliance, because although the dismissal finally was punishment sufficient to result in party's compliance, the purpose of sanctions is not merely to punish the offender, but also to deter others from similar conduct. (Even then, the Court stated it would consider a timely filed Motion to Amend.) The Supreme Court in *National Hockey League* reasoned that allowing the court to dismiss the case under

such truly flagrant circumstances, would operate to deter others from engaging in the same type of conduct. (E.g., after seventeen months of substantially unanswered crucial discovery, despite a court order and in the face of warnings that this failure to provide certain information could result in the imposition of sanctions, National Hockey still failed to timely answer written interrogations).

In the case at bar, the offense was far less egregious and certainly not in flagrant bad faith. The record establishes that the record on appeal was lost by the clerk and had to be reconstructed through considerable effort of Petitioners' counsel. Thus the severe sanctions imposed by the court against Shari Bair, et al, were manifestly unjust and in direct violation of their constitutional right to due process by law.

Moreover, unlike *National Hockey League,* such sanctions cannot rest on the needs of the judicial system to deter similar abuses in the future. This, like many other similar opinions, will never make the law books or official reporters. This case is designated as an "unpublished" opinion under TEX. R. APP. P. 90. It offers no guidance and can never be cited as authority. Even if the Court had published the opinion, one might be hard pressed for the lesson here. In order to succeed in the "deterrence" tactic, the Court would need some consistency in its rulings. Otherwise, one might see a published opinion, but it may not indicate the Court's next ruling on the next set of similar facts. See, for example a comparison of the facts of this case at bar (insufficient record cites leads to Court finding waiver and refusing to look at underlying issues) versus the case of *Brown v. Canada*, 1991 WL 67054 (Tex.App.—Houston [14th Dist.] May 2, 1991) (unpublished). In *Brown*, the Appellant wrote a 3-sentence brief; the Court of appeals struck the brief and ordered the appellant to rebrief by a date certain. In so doing, the Court cited *Inpetco, Inc. v. Texas American Banks/Houston N.A.*, 729 S.W.2d 300 (Tex.1987) as its precedent. Even though the appellant started with a 3-sentence brief (which the court struck) and even though the appellant, in spite of a Court order to rebrief, failed to do so, the Fourteenth Court of Appeals still considered the underlying facts and circumstances in finding no abuse of discretion by the trial court in dismissing appellant's claim for want of prosecution, and denying the subsequently filed motion to reinstate. Curiously, Justice Cannon, who

wrote the underlying opinion in this case, also authored the *Brown* opinion. The same jurist, far worse facts, yet a completely different application of the exact same law.

Many other unpublished opinions portray similar inconsistencies. To cure the problem, Petitioners' counsel strongly urged the Texas Supreme Court to, at minimum, order publication of the opinion so that the rule would be clarified and thus others would be on notice as to the nature of conduct viewed by the courts as constituting such "flagrant bad faith" as to warrant dismissal. The Supreme Court declined to do so.

POINT 2

CAN A LITIGANT BE SUBJECT TO DEATH PENALTY SANCTIONS WHEN (HIS) VIOLATION WAS CAUSED, IN WHOLE OR IN PART, BY THE BREACH OF DUTY OF A PUBLIC OFFICIAL, IN THIS CASE, THE DISTRICT CLERK? DOES THE SAME CONSTITUTE A DENIAL OF (HIS) FIFTH AND FOURTEENTH AMENDMENT RIGHTS TO DUE PROCESS OF LAW?

The District Clerk is entrusted with, and has the duty to, maintain the Court's file. The Texas Government Code empowers the clerk of each civil district court to have custody of and to carefully maintain and arrange the records relating to or lawfully deposited in the clerk's office. TEX. GOV'T. CODE ANN. §51.303(a) (Vernon 1988). In Texas criminal courts, the duty of the clerk is promulgated in the Texas Code of Criminal Procedure. It, similarly, states as follows:

> Duty of Clerks
> C. Each clerk of the district or county court shall receive and file all papers and exhibits in respect to criminal proceedings, issue all process in such cases, and perform all other duties imposed by law.
> ...

TEX. CODE CRIM. PROC. ANN. art. 2.21 (Vernon 1981).

Despite this responsibility and duty of the district clerk and the fact that this case, brought against several high profile defendants and their respective high profile law firms, had been filed almost five years with depositions, motions and discovery produced, and finally, despite the fact that the summary judgments filed by each individual defendant and the responses filed thereto were enormous in volume due to the exhibits attached by all parties, when it came time to prepare the record on appeal in this case in response to a timely request by the Petitioners, the district clerk had only a handful of the most recently filed court documents in its custody. Despite the Clerk's duty to maintain the file, the clerk could offer no explanation other than "that was all they had."

Respondents, in response to Petitioners' Motion for Rehearing, argued that it was the Petitioners' job (and not the duty of the district clerk) to bring forth the appellate record. In support of this argument, Respondents cited *Guillen v. DeLeon*, 887 S.W.2d 503 (Tex. App. -- San Antonio 1994, no writ). The *Guillen* case however, dealt with the timely ***request*** for the record, not the actual ***production*** of the record, as one might infer from reading Respondents' response. Clearly, the Texas Legislature charged the District Clerk with the responsibility for custody of the court's file.[11] Any fault that the record is not available on appeal, despite a timely request, clearly lies with the District Clerk.

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11 The clerks of both the civil and criminal courts have the duty to maintain their respective court files. An injustice exists, not in the duties of the seemingly similar positions, but in the ramifications applied for each clerk's violation of that duty. In criminal appeals, failure by the clerk to produce the appellate record on appeal results in the Court's automatic granting of a new trial. *See Perez v. State*, 824 S.W.2d 565 (Tex. Crim. App. 1992) (ordering new trial where court reporter's tapes and notes lost), *Payne v. State of Texas*, 802 S.W.2d 686 (Tex. Crim. App. 1990) (ordering new trial where testimony of three witnesses missing from record), *Emery v. State of Texas*, 800 S.W.2d 530 (Tex. Crim. App. 1990) (ordering new trial where pretrial hearing notes lost), and *Dunn v. State of Texas*, 733 S.W.2d 212 (Tex. Crim. App. 1987) (ordering new trial where portions of pretrial hearings, voir dire, and testimony of witness missing). Common to all of the above criminal cases, is the fact that, through no fault of the defendant, the appellate record was not complete, making the appellant (defendant) entitled to a new trial. In civil cases, however, an incomplete record apparently shifts the responsibility of the clerk for maintenance of the file to the appellant, who must have a sufficient record on appeal to support its claims of error.

Because of the district clerk's complete failure to properly maintain the court file in this matter, Petitioners were forced to recreate the court's file in order for the district clerk to prepare the record on appeal. Literally thousands of documents were filed with the district clerk attached to motions to substitute lost documents. This process was far more laborious than might seem as, prior to submission of any motions to substitute the documents, all defendants had to agree that they were true and correct copies; otherwise, a hearing would have to be scheduled before the administrative judge of Harris County to make that determination. Because of the steps necessary to obtain, what should have been readily available documents, there resulted not only an obvious delay (compounded by the defendants' refusal to stipulate to the documents as originals), but also an inability to cite to a record which was not altogether on file. Petitioners' case was ultimately dismissed due to insufficient record cites.

Petitioners contend that the dismissal of their case based, in whole or in part, on the state of the insufficiency of the record, violated their right to due process of the law. U.S. CONST. amend. V, XIV.

POINT 3

IS TEXAS RULE OF APPELLATE PROCEDURE 74(F), SO VAGUE AS TO RESULT IN THE VIOLATION OF A LITIGANT'S RIGHTS TO DUE PROCESS AND EQUAL PROTECTION UNDER THE LAW

Rule 74 (f) of the Texas Rules of Appellate Procedure provides:

> **(f) Argument.** A brief of the argument may present separately or grouped the points relied upon for reversal. The argument shall include: (1) a fair, condensed statement of the facts pertinent to such points, with reference to the pages in the record where the same may be found; and (2) such discussion of the facts and the authorities relied upon as may be requisite to maintain the point at issue. (See Appendix D.)

The court's dismissal under Rule 74(f) is unconstitutional since the rule provides little or no clear guidance as to what is required before a litigant's cause of action can be dismissed based on his failure to adequately brief the points on appeal. It is only within Rules 74(o), 74(p) and 83 of the Texas Rules of Appellate Procedure that one finds guidance as to the appropriate actions of an appellate court when faced with what they consider to be inadequate briefing.

Initially Rule 74(p) provides as follows:

> **Briefing Rules to Be Constructed Liberally**. The purpose of briefs being to acquaint the court with the points relied upon, the manner in which they arose, together with such argument of facts and law as will enable the court to decide the same, a substantial compliance with these rules will suffice in the interest of justice; *but for a **flagrant violation** of this rule the court **may require the case to be rebriefed**.*

(Emphasis added).

Rule 83 provides:

> *A judgment shall not be affirmed* or reversed or an appeal dismissed for defects or irregularities, in appellate procedure, either of form or substance, *without allowing a reasonable time to correct or amend such defects or irregularities* provided the court may make no enlargement of the time for filing the transcript and statement of facts except pursuant to paragraph (c) of Rule 54 ...

(Emphasis added).

Rule 74(o) provides that:

> [i]f the court shall strike or refuse to consider any part of a brief, *the court **shall** on reasonable terms, allow the same to be amended or supplemented.*

(Emphasis added).

Petitioners contend that they provided nine well-articulated points for the court's consideration which were, to the best of their counsel's ability, adequately briefed. Although their brief may have been lacking in what the Court considered to be an appropriate number of cites to the record, the sanction of which appellants were given notice may result was contained within Rules 74(o), 74(p) and 83 of the Texas Rules of Appellate Procedure, to wit, for flagrant violations they may be ordered to rebrief. (see Appendix D). To this end, Petitioners were more than willing to do so. In fact, Petitioners, during oral argument, offered to amend, supplement and/or re-brief in accordance with the transcript finally on file. This did not invoke a favorable response by the court. In fact, counsel later tendered an amended brief and, although they tendered the amended brief with their Motion for Rehearing requesting leave to file the same, the request was denied. To the extent Petitioners' conduct is held to be a flagrant violation as contemplated by Rule 74(p), Petitioners contend that the term "flagrant" in this rule is unconstitutionally vague and deprives them of their due process rights. U.S. CONST. amend. V, XIV.

POINT 4

DOES THE VII AMENDMENT GUARANTEE A LITIGANT THE RIGHT TO A TRIAL BY JURY SO AS TO PRECLUDE SUMMARY JUDGMENT WHERE A GENUINE ISSUE OF MATERIAL FACT CONTINUES TO EXIST?

POINT 5

WHERE A SUMMARY JUDGMENT IS REVIEWED ON APPEAL "DE NOVO," DOES THE APPELLATE COURT'S FAILURE TO REVIEW THE RECORD IN THE LIGHT MOST FAVORABLE TO THE NON-MOVANT, CONSTITUTE A VIOLATION OF A LITIGANT'S RIGHT TO TRIAL BY JURY?

(Arguments for Points 4 and 5)

Standard of Review--Summary Judgment

At the trial court level, summary judgment for the defendant is proper when the proof shows that no genuine issue of material fact exists on one or more of the essential elements of the plaintiff's cause of action, or when defendant establishes each element of an affirmative defense as a matter of law. *Black v. Victoria Lloyds Ins. Co.*, 797 S.W.2d 20, 27 (Tex.1990). A defendant who moves for summary judgment has the burden of showing that no material issue of fact exists on the plaintiff's cause of action. *Arnold v. National County Mut. Fire Ins. Co.*, 725 S.W.2d 165, 166-67 (Tex.1987). A summary judgment for the defendant disposing of the entire case is proper only if he/she proves that, as a matter of law, the plaintiff could not succeed upon any theory pled. *Delgado v. Burns*, 656 S.W.2d 428, 429 (Tex.1983). It is only then that the non-movant must expressly present to the trial court any reason that would defeat the movant's right to summary judgment by filing a written answer or response to the motion. *McConnell v. Southside Indep. School Dist.*, 858 S.W.2d 337, 341 (Tex.1993). In fact, for years it was the law of our state (Texas) that a summary judgment must stand on its own merit and that a non-movant need not even respond to the motion unless it was insufficient as a matter of law to support summary judgment. *City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 678 (Tex.1979). Although the court can determine legal insufficiency or "as a matter of law points" so as to allow the disposition of cases when the claim or defense has no legal merit, it cannot serve as fact finder without the litigant's consent.

Article VII provides "in suits at common law...the right to trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any court in the United States, than according to the rules of the common law." U.S. CONST. amend VII. Petitioners contend, however, that in this case, both the trial court and Court of Appeals strayed from the permissible boundaries honored by the common law, and resolved genuine issues of material fact themselves (against Petitioners) in violation of their (Petitioners') Seventh Amendment right to trial of those issues by a jury of their peers.

Ironically, the Court of Appeals threw out the Petitioners' Seventh Amendment claim because the Petitioners did not raise their objection to the trial court. In essence, the Respondents and the Court of Appeals

would require the Petitioners to file a motion with the trial court based on the fact that it (the trial court) had misapplied the standard for summary judgment, or otherwise assumed the role of "fact finder," contrary to Petitioners' election to trial by jury. Generally, this would be impractical, unnecessary and, as with other matters of law already reviewed and considered by the Trial Court, not required. (See TEX. R. APP. P. 52(d))

The result would more than likely have been similar to the Court of Appeals' response to the Petitioners' objection to its improper resolution, disputing material facts contrary to the evidence offered by the Petitioners; where the objection was made via a timely filed Motion for Rehearing it was summarily denied, without comment.

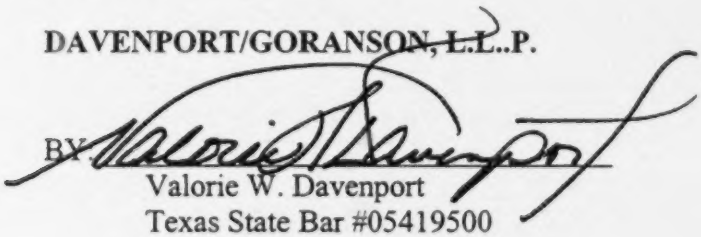
CONCLUSION

For the reasons set forth above, a Writ of Certiorari should issue to review the opinion of the Fourteenth Court of Appeals affirming the summary judgment of the trial court and the Texas Supreme Court's denial of a Petition for Review in this matter.

DATED: December 22, 1998

Respectfully submitted,

DAVENPORT/GORANSON, L.L..P.

BY: 

Valorie W. Davenport
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Houston, Texas 77002
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Attorney for Petitioners

APPENDIX A

NOTICE: NOT DESIGNATED FOR PUBLICATION. UNDER TEX.R.APP. P.90 UNPUBLISHED OPINIONS MAY NOT BE CITED AS AUTHORITY.

Shari BAIR, et. al., Appellant

v.

William Fred HAGANS, et. al., Appellee

No. 14-95-00316-CV.

Court of Appeals of Texas, Houston (14th Dist.).

May 29, 1997.

On Appeal from the 157th District Court Harris County, Texas Trial Court Cause No. 89-50647.

OPINION

CANNON.

*1 This is an appeal from a summary judgment. Appellants Shari Bair, individually and as representative of the estate of C.W. Bair, Peter Voskamp and Jerry Amussen (collectively "appellants"), brought this suit against three attorneys (Hagans, Abrams, and Matthews), two law firms (Sewell & Riggs and Hagans & Sydow), and a private investigator (Wilson) alleging a series of torts in connection with the appellees' filing of a bill of review action. The

defendant-appellees fall into three groups: Hagans and Hagans & Sydow (hereafter "Hagans"), Abrams, Matthews, and Sewell & Riggs (hereafter "Sewell & Riggs"), and Clyde Williams (hereafter "Williams"). The appellees all filed motions for summary judgment and the trial court granted those motions. In four points of error, appellants claim (1) the trial court erred in granting the summary judgment motions, and (2) the granting of the summary judgment motions denied them the right to trial by jury. We affirm.

I. Background

In 1982, appellants filed a stock fraud suit against Roman F. Arnoldy, John Arnoldy, and Triten Corporation (hereafter "the Arnoldy case"). The jury in that case returned a verdict in favor of appellants, but the trial court entered a judgment notwithstanding the verdict. The First Court of Appeals reversed the jnov. and entered judgment on the jury verdict on November 12, 1987. Appellee Hagans represented appellants in that case, along with attorney John O'Quinn. Appellees Matthews, Abrams, and Sewell & Riggs represented the defendants. After oral argument before the Court of Appeals, appellants Sewell and Riggs discovered facts which led them to believe O'Quinn had tampered with the jury in the Arnoldy case. Tom Alexander, acting as a special prosecutor for the State Bar of Texas, had also discovered the information during a barratry investigation targeting O'Quinn. Alexander, who retained Wilson as an investigator in the barratry investigation, reported the tampering charges to the Harris County District Attorney's office. Sewell & Riggs later also retained Wilson to continue the investigation into the tampering charges. In the course of investigating the barratry charges for Alexander and the tampering charges for Sewell & Riggs, Wilson obtained two affidavits from Hagans, who had severed his partnership with O'Quinn. Wilson also contacted two other witnesses and received affidavits concerning jury tampering from them. Sewell & Riggs provided this information to the District Attorney's office.

At this point, Sewell & Riggs filed a motion for rehearing in the Court of Appeals partially based on the allegations of jury tampering. The First Court of Appeals overruled this motion, but noted that "the contentions advanced should properly be resolved by appropriate bill of review proceedings, where evidence may be presented and a thorough factual determination made." Voskamp v. Arnoldy, 749 S.W.2d 113, 127 (Tex.App.--Houston [1st Dist.] 1987, writ denied). Only four days after the November 12, 1987 Court of Appeals opinion in the Arnoldy case, appellants moved in the trial court to enter judgment on the verdict. Upon a motion from Sewell & Riggs, the Court of Appeals issued an injunction enjoining appellants from interfering with its jurisdiction until issuance of its final mandate on November 18, 1987. On July 17, 1987, the Court of Appeals entered its mandate.

***2** After the judgment of the Court of Appeals but prior to the final mandate, Sewell & Riggs filed a bill of review action in the 11th District Court in Harris County. The bill of review raised the same jury tampering allegations raised in the motion for rehearing. On April 14, 1989, before the bill of review went to trial on the merits, the trial court entered an agreed order that forbade the appellants from attempting to enforce the Arnoldy judgment for 120 days and requiring the appellants to provide 10 days notice to Sewell & Riggs before attempting to enforce the judgment thereafter. This order noted that all the affected parties "appeared to advise the Court that all of the [parties] have agreed to this Order." On March 28, 1990, the trial court entered a take nothing judgment in the bill of review action, noting that "a compromise and settlement of the prior action in [the Arnoldy case] has been negotiated and agreed upon and that as a part of the compromise and settlement agreement the parties expressed their desire that the Court dismiss this Bill of Review proceeding."

While the bill of review action was still pending in the trial court, appellants filed this action in district court and a parallel suit in probate court. After the settlement agreeing to dismiss the bill of

review, the appellees moved for summary judgment in this case. The trial court granted summary judgment as to all defendants. Appellants now appeal from that judgment.

II. Waiver of Error

Appellants' brief in this case, and their record submitted on appeal, so fail to meet the requisites laid out by the Rules of Appellate Procedure as to waive virtually all error. An appellant bears the burden to adequately brief his points of error, citing this court to relevant pages in the record and to supporting legal authority. Tex.R.App. P. 74(d) ("In parentheses after each point, reference shall be made to the page of the record where the matter complained of is to be found"); Id. at 74(f) ("The argument shall include: (1) a fair, condensed statement of the facts pertinent to such points, with reference to the pages in the record where the same may be found; and ... the authorities relied upon for reversal"). When an appellant fails to cite authority supporting a point of error, he waives that point of error. Trenholm v. Ratcliff, 646 S.W.2d 927, 934 (Tex.1983); Casteel-Diebolt v. Diebolt, 912 S.W.2d 302, 304-05 (Tex.App.--Houston [14th Dist.] 1995, n.w.h.). Furthermore, failure to cite this court to relevant portions of the record also waives appellate review. Casteel, 912 S.W.2d at 305; Tacon Mechanical Contractors v. Grant Sheet, 889 S.W.2d 666, 671 (Tex.App.--Houston [14th Dist.] 1994, writ denied). As we have stated before, "this Court has no duty to search a voluminous record without guidance from appellant to determine whether an assertion of reversible error is valid." Casteel, 912 S.W.2d at 305; Stevens v. Stevens, 809 S.W.2d 512, 513 (Tex.App.--Houston [14th Dist.] 1991, no writ); Most Worshipful Prince Hall v. Jackson, 732 S.W.2d 407, 412 (Tex.App.--Dallas 1987, writ ref'd n.r.e.). The appellant bears the burden to demonstrate that the record supports his contentions and to make accurate references to the record to support his contentions on appeal. Casteel, 912 S.W.2d at 305; Elder v. Bro, 809 S.W.2d 799, 801 (Tex.App.--Houston [14th Dist.] 1994, writ

denied).

*3 Appellants wholly fail to adequately present their contentions on appeal. The record in this case consists of an original transcript and three supplemental transcripts. In total, the record amounts to 16 volumes and 3,710 pages. [FN1] In the entire preliminary statement and procedural history section of their brief, appellants include only one citation to the record. In fact, the one record citation included in this section does not refer us to summary judgment proof, but to exhibits attached to appellants' pleadings in this case (the exhibit referred to is a letter from the trial judge expressing concern about whether the bill of review proceeding was used as "leverage" against the appellants, in light of the severity of the charges). In the twenty page section of appellants' brief that attacks the summary judgments granted as to appellants' causes of action, they provide little additional reference to the record. Appellants divided this section into eight subsections, based on various cause of action. Five of these subsections (discussing claims of abuse of process, breach of the attorney-client relationship, intentional infliction of emotional distress, negligent misrepresentation and negligence per se) contain no citations to the appellate record whatsoever. Another subsection, discussing appellants' claims of civil conspiracy, contains only a single citation to the record--the same letter cited in the general statement of facts. Still another subsection, addressing claims of tortious interference with contract, fails to cite any legal authority. Only one of the subsections in this section of appellants' brief, a discussion of claims of malicious prosecution against Sewell & Riggs, contains citations both to the appellate record and to relevant legal authority.

> FN1. Several of the Appellees argue that even after being allowed to supplement the record three times, appellants still failed to include items necessary for our review. We do not reach these contentions.

This court granted appellants four extensions of time to file their brief (a total of 210 days) and also allowed an amendment to their original brief. The amended brief did not remedy the inadequacies of the first. We hold that by failing to adequately brief their claims, appellants have waived all arguments on appeal save those complaining of the trial court's grant of summary judgment on their claims of malicious prosecution. We will now address only those claims.

III. Standard of Review--Summary Judgment

At the trial court level, summary judgment for the defendant is proper when the proof shows that no genuine issue of material fact exists on one or more of the essential elements of the plaintiff's cause of action, or when defendant establishes each element of an affirmative defense as a matter of law. Black v. Victoria Lloyds Ins. Co., 797 S.W.2d 20, 27 (Tex.1990). A defendant who moves for summary judgment has the burden of showing that no material issue of fact exists on the plaintiff's cause of action. Arnold v. National County Mut. Fire Ins. Co., 725 S.W.2d 165, 166-67 (Tex.1987). A summary judgment for the defendant disposing of the entire case is proper only if, as a matter of law, plaintiff could not succeed upon any theory pled. Delgado v. Burns, 656 S.W.2d 428, 429 (Tex.1983). The non-movant must expressly present to the trial court any reason that would defeat the movant's right to summary judgment by filing a written answer or response to the motion. McConnell v. Southside Indep. School Dist., 858 S.W.2d 337, 341 (Tex.1993). However, a summary judgment must stand on its own merits; the non-movant need not respond to the motion to contend on appeal that it is insufficient as a matter of law to support summary judgment. City of Houston v. Clear Creek Basin Auth., 589 S.W.2d 671, 678 (Tex.1979). If the non-movant fails to present an issue to the trial court, he may not later plead that new ground as error on appeal. City of Houston v. Clear Creek Basin Auth., 589 S.W.2d 671, 678-79 (Tex.1979).

IV. Malicious prosecution

*4 In their malicious prosecution claim, appellants argue that Sewell & Riggs instituted the bill of review action in bad faith in order to force settlement of the judgment in the Arnoldy suit. In a suit for malicious prosecution, the plaintiff must plead and prove the following:

1. the institution or continuation of judicial proceedings;
2. by, or at the instance of the defendant(s);
3. malice in the commencement of the proceedings;
4. termination of the proceedings in the plaintiff's favor; and
5. damages.

James v. Brown, 637 S.W.2d 914, 918 (Tex.1982). Because we hold appellees showed no genuine issue of material fact existed as to appellants' damages from the bill of review action, we overrule this point of error.

We note at the outset that the filing of a bill of review action does not affect the finality of the judgment sought to be set aside. Schwartz v. Jefferson, 520 S.W.2d 881, 889 (Tex.1975). Once the final mandate was issued from the court of appeals, appellants may have enforced the Arnoldy judgment. See Tex.R.App. P. 87(a) ("When the judgment of the appellate court affirms the judgment of the trial court ... the trial court need not make any further order or decree and the clerk of the trial court shall proceed to issue execution thereon as in other cases"). None of the actions of Sewell & Riggs prevented that enforcement. Appellants argue the injunction granted against them preventing execution of any judgment prior to the issuance of mandate by the court of appeals in the original Arnoldy appeal "interfered with the legitimate property of Appellants," and that this interference supplied evidence of damages from the bill of review action. However, the bill of review action and the injunction of the court of appeals were unrelated. The court of appeals issued an injunction solely to

protect its jurisdiction in the original appeal.

We also note that appellants had signed an agreed order in the Arnoldy suit preventing enforcement of the judgment for 120 days, a period that ended not quite a month after issuance of the appellate court mandate. After the 120 day period, appellants could have enforced the agreement upon ten days written notice to Sewell & Riggs. Appellants gave no written notice of enforcement. By their own agreement, appellants could not have enforced the Arnoldy judgment until conclusion of the 120 day period. After that time, nothing prevented enforcement except notice from appellants.

The facts in this case clearly show that the bill of review action instituted by Sewell & Riggs had no effect on enforcement of the Arnoldy judgment, as alleged by appellants. Because this leaves no genuine issue of material fact as to damages from appellants' claims of malicious prosecution, we hold that the trial court's grant of summary judgment was proper. Accordingly, we overrule appellants' first three points of error.

V. Denial of the Right to Trial by Jury

*5 In their fourth point of error, appellants claim the trial court denied them their right to trial by jury in granting summary judgment, in violation of the U.S. and Texas Constitutions. Appellants failed to raise these claims in the trial court. A failure to present a claim, even a claim of constitutional magnitude, at the trial court level waives that claim. Dreyer v. Greene, 871 S.W.2d 697, 698 (Tex.1993); Tex.R.App. P. 52(a). We overrule appellants' fourth point of error.

VI. Conclusion

Having found no merit in any of appellants' points of error, we affirm the judgment of the trial court.

Panel consists of Justices ANDERSON, O'NEILL, and CANNON. [FN2]

FN2. The Honorable Bill Cannon sitting by assignment.

APPENDIX B

THE SUPREME COURT OF TEXAS
Post Office Box 12248
Austin, Texas 78711 **(512) 463-1312**

April 09, 1998

Ms. Valorie W. Davenport
Davenport Goranson
1100 Louisiana, Suite 4450
Houston, TX 77002

Mr. Richard A. Sheehy
McFall Sherwood & Sheehy
909 Fannin Street, Suite 2500
Houston, TX 77010-1003

Mr. Knox D. Nunnally
Vinson & Elkins
1001 Fannin, Suite 2300
Houston, TX 77002-6760

Mr. John H. Stevenson
Barnett & Craddock
1001 Fannin, Suite 3801
Houston, TX 77002

RE: **Case Number 97-0934**
Court of Appeals Number: 14-95-00316-CV
Trial Court Number: 89-50647

Style: **SHARI BAIR, individually and as representative of the ESTATE OF C.W. BAIR, PETER VOSKAMP, and JERRY AMUSSEN**
v.
WILLIAM FRED HAGANS, SEWELL & RIGGS, BARRY ABRAMS, WILLIAM MATTHEWS, CYCLE WILSON, and HAGANS & SYDOW

Dear Counsel:

Today, the Supreme Court of Texas denied the petition for review in the above styled case.

Sincerely,

John T. Adams, Clerk

by /s/
Michael C. Murphey, Deputy

cc: Ms. Mary Jane Smart, Clerk
Mr. Charles Bacarisse

APPENDIX C

THE SUPREME COURT OF TEXAS
Post Office Box 12248
Austin, Texas 78711 **(512) 463-1312**

July 30, 1998

Ms. Valorie W. Davenport
Davenport Goranson
1100 Louisiana, Suite 4450
Houston, TX 77002

Mr. Richard A. Sheehy
McFall Sherwood & Sheehy
909 Fannin Street, Suite 2500
Houston, TX 77010-1003

Mr. Knox D. Nunnally
Vinson & Elkins
1001 Fannin, Suite 2300
Houston, TX 77002-6760

Mr. John H. Stevenson
Barnett & Craddock
1001 Fannin, Suite 3801
Houston, TX 77002

RE: **Case Number 97-0934**
Court of Appeals Number: 14-95-00316-CV
Trial Court Number: 89-50647

Style: **SHARI BAIR, individually and as representative of the ESTATE OF C.W. BAIR, PETER VOSKAMP, and JERRY AMUSSEN**
v.
WILLIAM FRED HAGANS, SEWELL & RIGGS, BARRY ABRAMS, WILLIAM MATTHEWS, CYCLE WILSON, and HAGANS & SYDOW

Dear Counsel:

Today, the Supreme Court of Texas overruled the motion for rehearing in the above styled petition for review.

Sincerely,

John T. Adams, Clerk

by /s/
Michael H. Kopp, Deputy

cc: Ms. Mary Jane Smart, Clerk
Mr. Charles Bacarisse

APPENDIX D

TEXAS RULE OF APPELLATE PROCEDURE 74

Tex. R. App. 74

REQUISITES OF BRIEFS

Briefs shall be brief. Briefs shall be filed with the Clerk of the Court of Appeals. They shall be addressed in to "The Court of Appeals" of the correct district. In civil cases the parties shall be designated as "Appellant" and "Appellee," ...

(a) Names of All Parties to the Trial Court's Final Judgment. A complete list of the names and addresses of all parties to the trial court's final judgment and their counsel in the trial court ...

(b) Table of Contents and Index of Authorities. ...

(c) Preliminary Statement. The brief should contain a brief general statement of the nature of the cause or offense, i.e., whether it is suit for damages on a note, or a prosecution for murder, and the result in court. ...

(d) Points of Error. A statement of the points upon which an appeal is predicated shall be stated in short form without argument and be separately numbered. In parentheses after each point, reference shall be made to the page of the record where the matter complained of is to be found. ...

...

(f) Argument. A brief of the argument may present separately or grouped the points relied upon for reversal. The argument shall include: (1) a fair, condensed statement of the facts pertinent to such points with reference to the pages in the record where the same may be found; and (2) such discussion of the facts and the authorities relied upon as may be requisite to maintain the point at issue. ...

(g) Prayer for Relief. ...

...

(o) Amendment or Supplementation. Briefs may be amended or supplemented at any time when justice requires upon such reasonable terms as the court may prescribe, and if the court shall strike or refuse to consider any part of a brief, the court shall on reasonable terms allow the

same to be amended or supplemental.

(p) Briefing Rules to be Construed Liberally. The purpose of briefs being to acquaint the court with the points relied upon, the manner in which they arose, together with such argument of facts and law as will enable the court to decide the same, a substantial compliance with these rules will suffice in the interest of justice; but for a flagrant violation of this rule the court may require the case to be rebriefed.

...

APPENDIX E

FOURTEENTH COURT OF APPEALS
1307 San Jacinto, 11th Floor
Houston, Texas 77002

March 21, 1996

RE: Case No. 14-95-00316-CV

Style: Bair, Shari, et al.
V. Hagans, William Fred

Please be advised that, on this date, the Court GRANTED appellants' motion for leave to file supplemental transcript in the above cause; time extended to and including April 4, 1996, however, parties will not be permitted to re-brief referencing the supplement transcript.

T.C. Case # 89-50647 **Mary Jane Smart, Clerk**

Valorie W. Davenport
1100 Louisiana
Suite 4450
Houston, TX 77002

APPENDIX F

FOURTEENTH COURT OF APPEALS
1307 San Jacinto, 11th Floor
Houston, Texas 77002

April 25, 1996

RE: Case No. 14-95-00316-CV

Style: Bair, Shari, et al.
V. Hagans, William Fred

Please be advised that, on this date, the Court GRANTED appellants' motion for leave to file supplemental transcript in the above cause; time extended to and including May 20, 1996. Appellant's brief may be amended with transcript references.

T.C. Case # 89-50647 **Mary Jane Smart, Clerk**

Valorie W. Davenport
1100 Louisiana
Suite 4450
Houston, TX 77002

APPENDIX G

FOURTEENTH COURT OF APPEALS
1307 San Jacinto, 11th Floor
Houston, Texas 77002

August 7, 1997

RE: Case No. 14-95-00316-CV

Style: Bair, Shari, et al.
V. Hagans, William Fred

Please be advised that on this date the Court DENIED appellant's motion for leave to file amended brief in the above cause.

T.C. Case # 89-50647 **Mary Jane Smart, Clerk**

Valorie W. Davenport
1100 Louisiana
Suite 4450
Houston, TX 77002

APPENDIX H

FOURTEENTH COURT OF APPEALS
1307 San Jacinto, 11th Floor
Houston, Texas 77002

August 28, 1997

RE: Case No. 14-95-00316-CV

Style: Bair, Shari, et al.
V. Hagans, William Fred

Please be advised that on this date, the Court OVERRULED appellants' amended motion for rehearing in the above cause.

Further, application for writ of error, if any, must be submitted on or before Monday, September 29, 1997.

T.C. Case #89-0647 **Mary Jane Smart, Clerk**

Valorie W. Davenport
1100 Louisiana
Suite 4450
Houston, TX 77002